(2)

No. 90-297

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PORTER H. MITCHELL,

Petitioner,

v.

MOBIL OIL CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the court of appeals, applying the proper standard of review, correctly reviewed the evidence and determined that petitioner failed to establish that Mobil's valid business justifications for amending its pension plan were a mere pretext for age discrimination.

2. Whether the court of appeals correctly held that petitioner was not a Mobil Retirement Plan "participant" entitled to sue under § 502(a) of the Employee Retirement Income Security Act, 29 U.S.C. § 1132(a), because he received all the retirement benefits he was entitled to when he retired in 1984.

LIST OF PARTIES

Mobil Oil Corporation, *et al.*, adopt the list of parties in petitioner's petition, but note that the Trustees of the Retirement Plan of Mobil Oil Corporation were never served with process.

A list of Mobil Oil Corporation's parent and all non-wholly-owned subsidiaries, required by Sup. Ct. R. 29.1, may be found in the Appendix, beginning at A-5.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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This case involves a routine pension-plan change and an employee who chose to retire and was replaced by an older worker. In seeking review of the Tenth Circuit's rejection of his Age Discrimination in Employment Act ("ADEA") claim, petitioner disputes only the court of appeals' evaluation of the evidence (or lack thereof) in the trial record. His attempt to recast these factual determinations as legal errors does not warrant this Court's review. *NLRB* v. *Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n.8 (1981); *Rudolph* v. *United States*, 370 U.S. 269, 270 (1962).

Nor is there any split among the circuits. Sup. Ct. R. 10.1(a). The Tenth Circuit's holding that petitioner was not a "participant" who could sue under the Employee Retirement Income Security Act ("ERISA")—because he had received all of his retirement benefits—(a) is consistent with the decisions of every other court of appeals that has addressed the issue and (b)

correctly applies *Firestone Tire & Rubber Co.* v. *Bruch*, 109 S. Ct. 948, 957-58 (1989).

The petition should be denied.

JURISDICTION

Mobil accepts petitioner's jurisdictional statement, but notes that, contrary to petitioner's claim [at 1 n.1], the Tenth Circuit did not "refuse to rule on" his request for a new trial on remand. The court denied it. [Appendix to Mitchell petition ("App.") 46.][1]

COUNTERSTATEMENT OF THE CASE

The basic issue in this case is whether an employer may amend its pension plan to take into account eight years of unprecedented inflation. The Tenth Circuit correctly held that Mobil could do so without violating ADEA and that, because petitioner had received all of his retirement benefits, he had no claims under ERISA.

A. Counterstatement of the Facts

The normal form of retirement benefit under Mobil's employer-funded, defined-benefit Retirement Plan (the "Plan") has always been a monthly annuity check for life. Since 1977, however, eligible Mobil employees could receive their benefits in a single lump-sum payment, based on the discounted present value of the monthly annuity payments each employee would expect to receive over his or her lifetime. In 1977, Mobil used a 5% interest-rate assumption to compute the present lump-sum value of an employee's future annuity benefits under the Plan. [App. 3.]

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[1] Petitioner asked for and obtained an extension of time from Justice White to file his petition for certiorari on the ground that he "intend[ed] to present [this] issue" in his petition if (as he correctly predicted) the Tenth Circuit denied his motion. The petition, however, does not raise it.

To be eligible for the lump-sum option, an employee had to have either an accrued lump-sum pension benefit or a net worth (excluding the lump-sum benefit itself) of at least $250,000. [App. 3.] This eligibility threshold was intended to help ensure that someone who gave up the security of a lifetime monthly check and took on the investment risks of a "one-shot" lump-sum payment had enough of a "financial cushion" to bear those risks and withstand any adverse financial consequences. [Tr. 156-57, 286, 290-91, 347, 362-63, 385-86, 873-74; PX 4.]

Between 1977 (when the lump-sum option was put into the Plan) and 1984, interest rates soared from around 5% to over 10%, while the Consumer Price Index ("CPI") rose from 177.1 to over 300. This inflation had two marked effects on Mobil's Retirement Plan.

First, the lump sum appeared more valuable than the monthly annuity—even though they were supposed to be actuarial equivalents—because Mobil still computed the annuity's present value using a 5% interest-rate assumption, while market interest rates had risen to above 9% and 10%. Most employees therefore wanted a lump-sum payment because they thought it was worth more than an annuity.

Second, by 1984, inflation made the $250,000 1977 threshold worth only about $147,500 in constant 1977 dollars. Many more employees could therefore meet the $250,000 threshold using inflated 1984 dollars—even though in real terms they did not have the financial resources the 1977 $250,000 test was designed to ensure.

As the number of employees taking the lump sum increased and threatened to approach 100%, Mobil became concerned that (a) lump-sum withdrawals could strain the Plan's assets and jeopardize all employees' benefits [App. 17; Tr. 234-35; PX 94], and (b) employees who lacked the requisite "financial cushion" (in constant dollars) were abandoning the security of an annuity for the more risky lump-sum payment [Tr. 225-26, 877-78, 898; DX JV at 2].

The obvious solution was to raise the $250,000 threshold and the 5% interest-rate assumption to current levels, in effect

indexing them for inflation and changing economic conditions—as Mobil could have done in 1977, when it adopted the lump-sum option. ($250,000 in 1977 dollars was the equivalent of $450,000 in projected 1985 dollars.)

In early 1984, Mobil therefore (a) raised the lump-sum interest rate from 5% to 9.5% prospectively (*i.e.*, for benefits accrued after 1984), (b) raised the lump-sum eligibility threshold from $250,000 to $450,000, and (c) indexed the new threshold to the CPI. [App. 3-4; PX 8A, PX 10A.] These amendments, which would apply to all Mobil employees retiring on or after February 1, 1985, were announced on July 2, 1984 [PX 46]—to give employees already eligible to retire (*i.e.*, age 55 and over) "at least six months to take advantage of the old eligibility requirements" for the lump sum [PX 8A; App. 17-18].

By providing a six-month notice or "window" period, Mobil gave every retirement-eligible employee a choice: the employee could (a) retire before the new amendments became applicable and receive pension benefits under the "old" Plan, or (b) continue to work and retire later under the amended Plan, like all younger (non-retirement-eligible) employees. [App. 4.] It is the "window" period that lies at the heart of petitioner's complaint, because he alleges that it was used to "force" retirement-eligible employees to elect early retirement.[2]

Petitioner was almost 56 years old in July 1984 and was therefore eligible to retire when Mobil announced the 1984 Plan amendments. With 31 years of service and a 1984 salary of $83,560, he knew he could meet a $450,000 lump-sum threshold if he retired at 60. But he was not 100% sure he would satisfy possible *future* requirements (indexed to the CPI) for a lump sum in lieu of a lifetime annuity if he continued to work. [App. 4; Tr. 566-67, 595, 614-18.]

Mobil did not want petitioner to retire. His supervisors told him that they were pleased with his work and that he would be promoted if he stayed. [App. 7; Tr. 635-37.] But he wanted

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[2] As petitioner himself put it, if Mobil had simply raised the lump-sum threshold without offering a "window" period, "[t]hat wouldn't have forced me out of my job." [Tr. 651.]

"certainty" and "unqualified assurance" that he would be able to receive a lump-sum payment [Tr. 595, 661, 664]—guarantees that Mobil could not give him.[3] He therefore announced on October 1, 1984 that he would retire on January 1, 1985 with a lump-sum pension under the "old" Plan. After he retired, Mobil filled his position with an *older* employee. [Tr. 958.]

Petitioner's lump-sum pension was valued at approximately $471,000 when he retired. The lump sum he actually received was discounted to $385,026.98 because petitioner was paid his benefits—and could earn interest on them—at age 56, rather than at age 60. [*See* Tr. 559 (sum actually paid to petitioner was discounted by approximately $86,000); PX 67.][4] Petitioner also received approximately $250,000 from his Mobil Savings Plan, for a total of roughly $635,000 (not counting stock-ownership plan benefits). These payments represented everything he was entitled to receive under Mobil's benefit plans.

B. Counterstatement of Proceedings

After voluntarily retiring, petitioner filed an age-discrimination charge against Mobil with the Equal Employment Opportunity Commission ("EEOC") in 1985. The EEOC rejected his charge [PX 56], and petitioner then filed suit in the United States District Court for the District of Colorado, alleging violations of ADEA and ERISA stemming from Mobil's 1984 Plan amendments.

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[3] Petitioner's claim [at 4] that Mobil's "[r]aising the threshold would forever disqualify [him]" from obtaining a lump-sum payment is contradicted by the record. Petitioner had a good chance of meeting the new threshold, even with CPI indexing [*see* PX 67, PX 87], but he did not want to take even a small chance that he would not do so.

[4] "Normal" retirement age at Mobil was 65. Mobil's Plan provided for an undiscounted retirement benefit at age 60, and it discounted retirement benefits by 5% per year for any employee who retired before age 60 [App. 3]—because the employee would receive more years' worth of annuity payments (or their lump-sum actuarial equivalent, which could be invested) than would an employee retiring at normal retirement age (65). Social Security works the same way. The granting of unreduced benefits to employees retiring between 60 and 65 might be deemed a "subsidy" [PX 133] not required by actuarial principles.

In December 1988, a jury awarded petitioner $994,666.34 on his ADEA claim. The district court later awarded him $588,703.58 on his ERISA claim (subsumed within the larger ADEA award). [App. 42.]

Mobil appealed, and the Tenth Circuit reversed. It held that (a) petitioner had not established that Mobil amended its Plan as a pretext for discriminating against older employees, and (b) petitioner did not have a cause of action as a "participant" under ERISA because he had received all the benefits Mobil owed him under the Plan and was not seeking any additional benefits.

REASONS FOR DENYING THE WRIT

Petitioner sounds three principal themes under ADEA, none of which has merit or is worthy of certiorari: the Tenth Circuit (i) improperly took the case from the jury, (ii) erroneously reviewed the trial record, and (iii) is "hostil[e] to the purposes of ADEA." The claim of "hostility to ADEA" is a transparent attempt to manufacture a certiorari issue; the other claims relate only to the court of appeals' proper review of the particular facts in the record.

The Tenth Circuit's rejection of petitioner's ERISA arguments follows this Court's teaching and the unanimous view of the other courts of appeals that have ruled on this issue.

I

The Tenth Circuit Correctly Ruled that the District Court Should Have Granted Mobil's Motion for a Directed Verdict on the ADEA Claim.

The Tenth Circuit applied the proper legal standards in reviewing and reversing the district court's denial of Mobil's motion for a directed verdict. Contrary to petitioner's misrepresentations, the record amply supported the Tenth Circuit's conclusion that petitioner had not provided evidence from which a jury could reasonably find that petitioner had been discriminated against or constructively discharged because of his age.

A. The Tenth Circuit Applied the Proper Standard for Reviewing a Denial of a Motion for Directed Verdict.

The Tenth Circuit stated it would "reverse the trial court's denial of [Mobil's] motion for a directed verdict only if, viewed in the light most favorable to the nonmoving party, the evidence and all reasonable inferences to be drawn therefrom point but one way, in favor of the moving party." [App. 16-17.]

This is the correct standard. *Anderson* v. *Liberty Lobby*, 477 U.S. 242, 250-52 (1986); 5A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 50.02[1], at 50-27 (2d ed. 1990) (collecting cases) ("appellate court must consider the evidence in the light and with all reasonable inferences most favorable to the party opposed to the motion").

Petitioner [at 18-19] erroneously relies on *Lavender* v. *Kurn*, 327 U.S. 645, 653 (1946), for the proposition that " 'an evidentiary basis for the jury's verdict' " is sufficient to withstand a motion for a directed verdict and that " 'a complete absence of probative facts' " is required for a reversal.

The Tenth Circuit was not obligated to accept *any* amount of evidence—however slight—to support the verdict. As this Court has emphasized, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be *insufficient*; there must be evidence on which the jury could *reasonably* find for the plaintiff." *Anderson* v. *Liberty Lobby*, 477 U.S. at 252 (emphasis added); *accord Brady* v. *Southern Ry. Co.*, 320 U.S. 476, 479-80 (1943).[5]

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[5] Petitioner ignores that *Lavender* found "sufficient evidence" and a "*reasonable* basis in the record" for submitting the case to the jury and accepting the jury's inferences. 327 U.S. at 652 (emphasis added). But even if *Lavender* (a Federal Employer Liability Act ("FELA") case) could be read as permitting a mere scintilla of evidence to suffice, *Anderson* rejects that standard.

Lavender also does not apply to non-FELA cases. 5A J. Moore & J. Lucas, ¶ 50.02[1], at 50-25. Other than inapposite cases under Fed. R. Civ. P. 52(a) (findings of fact by trial court), all but two of the cases petitioner cites [at 18-19] are FELA cases. The two non-FELA cases—*Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962), and *Aetna Life Ins. Co.* v. *Ward*, 140 U.S. 76, 91 (1891)—apply essentially the same standard of review the Tenth Circuit used here.

Because the court of appeals correctly found that there was "*no* evidence to support [petitioner's] inference" that Mobil had amended the Plan and provided a "window" period to force surplus older workers to retire [App. 20 (emphasis added)], petitioner could not have prevailed in any event—even under a "scintilla" test.

B. The Tenth Circuit Properly Followed the Three-Part Analysis for Discrimination Cases.

The Court has established a three-step framework for both disparate-impact and disparate-treatment cases: (a) the plaintiff must present a prima facie case of discrimination; (b) the employer must produce evidence of a "business justification" for its allegedly discriminatory actions; (c) the plaintiff must then prove that those business practices were merely a "pretext" for discrimination. *Wards Cove Packing Co.* v. *Atonio*, 109 S. Ct. 2115, 2125-26 (1989); *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 252-53 (1981). The Tenth Circuit properly applied this framework here.

Contrary to petitioner's contention [at 12], *United States Postal Serv. Bd. of Governors* v. *Aikens*, 460 U.S. 711 (1983), has nothing to do with this case. There the Court vacated and remanded because the court of appeals (and the district court) had "evaded the ultimate question of discrimination *vel non*" (the third step) by focusing only on the first step, "whether Aikens made out a prima facie case," even though the case had been "fully tried on the merits . . . ." 460 U.S. at 714.

Here, the Tenth Circuit did reach "the ultimate question of discrimination *vel non*." It (a) reviewed petitioner's prima facie case [App. 9-11], (b) assessed Mobil's business justifications [App. 16-18] and then (c) correctly concluded that Mobil had not adopted its Plan amendments as a pretext for discriminating against older workers [App. 18-20].

As the Court noted in *Aikens*, the three-step inquiry is "a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination."

460 U.S. at 715. The Tenth Circuit applied this framework in just that way.[6]

Petitioner's assertion that the Tenth Circuit applied the "wrong" three-part test is also irreconcilable with his acknowledgment [at 12] that the court may proceed directly to the " 'ultimate question of discrimination *vel non*' " and that the analytical framework for considering that issue was " 'never intended to be rigid, mechanized or ritualistic' " (quoting *Aikens*, 460 U.S. at 714-15). Petitioner's attempts [at 9-10] to conjure distinctions between disparate-impact and disparate-treatment cases are therefore meaningless.

In either an impact case or a treatment case, the employer satisfies its "second-step" burden by articulating a business justification for its conduct. *Wards Cove*'s requirement of "a reasoned review of the employer's justification" in an *impact* case was meant to weed out "mere insubstantial justification[s]," 109 S. Ct. at 2126—a consideration equally applicable in a *treatment* case. *Burdine*, 450 U.S. at 255, 258 (treatment case: employer's second-step explanation "must be legally sufficient to justify a judgment for the defendant"; rejecting contention that employer " 'may compose fictitious, but legitimate, reasons for his actions' "); *see also Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 998 (1988) (plurality opinion) (impact case: employer need only "produc[e] evidence that its employment practices are based on legitimate business reasons").

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[6] So have many other courts of appeals in fully tried ADEA cases. *E.g.*, *Laurence* v. *Chevron, U.S.A.*, 885 F.2d 280, 283-85 (5th Cir. 1989) (reversing verdict for plaintiff); *Bartek* v. *Urban Redev. Auth.*, 882 F.2d 739, 742-43 (3d Cir. 1989) (affirming verdict for plaintiff); *Carter* v. *City of Miami*, 870 F.2d 578, 581-85 (11th Cir. 1989) (reversing verdict for plaintiff); *Arnold* v. *United States Postal Serv.*, 863 F.2d 994, 1000 (D.C. Cir. 1988), *cert. denied*, 110 S. Ct. 140 (1989) (reversing judgment for plaintiff); *Gray* v. *New England Tel. & Tel. Co.*, 792 F.2d 251, 254 (1st Cir. 1986) (affirming directed verdict for defendant); *Holley* v. *Sanyo Mfg.*, 771 F.2d 1161, 1164-68 (8th Cir. 1985) (reversing verdict for plaintiff); *Christensen* v. *Equitable Life Assurance Soc'y*, 767 F.2d 340, 342-44 (7th Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986) (reversing verdict for plaintiff).

Nothing in the Tenth Circuit's decision suggests that the court believed Mobil could satisfy its burden of production merely by articulating an insubstantial business reason. The court's careful consideration of the evidence demonstrates that the Tenth Circuit gave Mobil's business justifications the requisite "reasoned review."

The ultimate issue in the "third step" of both impact and treatment cases is also the same: whether the employer's business practices were merely a "pretext for discrimination." *Wards Cove*, 109 S. Ct. at 2126 (impact); *Burdine*, 450 U.S. at 253 (treatment); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975) (impact); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 804 (1973) (treatment); *see also Connecticut* v. *Teal*, 457 U.S. 440, 447 (1982) (an impact case, cited by Tenth Circuit in describing petitioner's burden of proving that Mobil's actions were a pretext for discrimination [App. 16]).

If the employer's proffered justifications are "unworthy of credence," they might be "pretextual." Proof of less onerous but equally effective alternatives also might make the employer's business reasons "unworthy of credence," and therefore "pretextual." The bottom line, however, always is "pretext." The various descriptive phrases mean essentially the same thing and are not substantively different "tests."

The Tenth Circuit's reference to what petitioner calls the " 'unworthy of credence' test," rather than to some other semantic formulation (such as "less onerous alternatives"), therefore does not mean—as petitioner argues [at 9-10]—that the court ignored any evidence of "pretext" that might support the jury verdict.

Petitioner's assertion [at 13-14] that the Tenth Circuit reversed on "fact issues [*i.e.*, pretext] the jury never had to consider in order to find in favor of petitioner" is also incorrect.

The jury was specifically (and, petitioner claims [at i], correctly) instructed to reach the issue of pretext "[i]f defendant has presented evidence of a legitimate, nondiscriminatory, business reason." [App. 49.] It was not told to stop at the second step, without considering pretext, if it did not credit Mobil's

business justifications. The Tenth Circuit therefore followed the same path the jury was told to follow.

Petitioner also argues that the Tenth Circuit reversed because he "had failed to satisfy a mandatory burden of production at the third step . . . , *not* because [the court] concluded . . . that no rational trier of fact could have found that Mobil was motivated by a discriminatory reason." He is again wrong. The Tenth Circuit carefully reviewed the entire record and held that "[t]he inference [of discrimination] which Mr. Mitchell asks us to draw . . . is not a reasonable one . . . ." [App. 20.] Given the absence of any reasonable basis in the record for a finding of pretext, the Tenth Circuit properly ruled that the district court should have granted Mobil's motion for a directed verdict.

C. The Court of Appeals Did Not "Supply" Mobil with a Business Reason.

The record, not the court of appeals, supplied the business justifications for Mobil's decision to amend the Plan. Mobil presented evidence of several reasons for the threshold change—including its concern that (a) lump-sum withdrawals could strain the Plan's assets and jeopardize employees' benefits [App. 17; Tr. 234-35; PX 94] and (b) employees who lacked the requisite "financial cushion" were assuming the investment risk of a lump-sum payment and might be left with inadequate resources during their retirement years [Tr. 225-26, 877-78, 898; DX JV at 2].

The Tenth Circuit recognized the mathematically demonstrable proposition that the Plan amendments, by increasing the threshold and linking it to the CPI, "would both restore the threshold to the equivalent of its original level in 1977 dollars and protect it from future erosion by inflation." [App. 17.] Restoration and protection of an important feature of Mobil's Plan design is itself a legitimate business reason.

The Tenth Circuit expressly stated that "over-utilization" of the lump sum and the attendant risk of drain of Plan assets provided a legitimate business reason for the threshold change, and the court cited fairness to employees as a legitimate business reason for the "window" period.

By the same token, petitioner's claim [at 21-22] that Mobil "abandoned" its drain-on-the-Plan rationale misrepresents the record.

Petitioner has tried to alter the record to assert that a Mobil witness denied that "the rationale for this threshold [change] was really the amount of money coming out of the plan" [at 22]. The question actually posed to the witness did not include the word "[change]." [Tr. 290.] Petitioner's lawyers have now added that word in an attempt to transform a question about "the rationale for the threshold" into a very different one asking about the rationale for *changing* the threshold. As the Mobil witness answered, "the rationale for the threshold was the very pronounced philosophy and belief of our Executive Committee that the normal form of pension should be annuity form." [Tr. 290-91.]

The witness' acknowledgment that the Plan was overfunded in 1984 does not obviate Mobil's legitimate long-range concern that continuing increases in lump-sum withdrawals and changes in investment performance (interest-rate shifts, stock-market volatility, and the like) could threaten the Plan's financial security in *future* years, "and actuaries can't make those kinds of predictions." [Tr. 234-35; App. 17.]

Petitioner's assertion that Mobil's counsel "abandoned" the "Plan-drain" justification in his oral motion for a directed verdict is disingenuous. Counsel's argument that Mobil had demonstrated a reasonable business justification for amending the Plan and that petitioner had failed to prove the existence of an equally effective alternative encompassed all the evidence in the record, including that dealing with the potential drain on the Plan. The fact that counsel highlighted only the most fundamental reasons (restoring the Plan's basic design and retaining the annuity as the normal form of retirement benefit) in the very brief exchange with the court on this point does not mean that Mobil abandoned the other closely related reasons for its legitimate business decision to change the threshold.[7]

[7] Counsel's statements responded to the district court's question about the "business necessity . . . of changing the threshold." [App. 26.] Because

D. The Court of Appeals Correctly Found No Evidence of Pretext.

Chronology of the Plan Amendments. Petitioner concedes [at 23] that "Mobil began consideration of the plan amendments, with the retirement window, no later than January 1984." But he does not inform the Court that Mobil began its consideration of changing the threshold in September *1983* [App. 18] and that, on January 9, 1984, Mobil's Executive Committee "directed" that any change in the lump-sum threshold must have "a reasonable transition period in which employees could take advantage of the existing threshold requirement for lump-sum settlements between the announcement of any increase in that threshold amount and its effective date" [PX 7A at 2; App. 18-19].

As the court of appeals held [App. 19-20], the record is therefore clear that Mobil decided on the "window" period—the prerequisite for the alleged constructive discharge—no later than January 9, 1984. This was *before* the Executive Committee ever discussed the possible Superior Oil Company merger on February 2 [App. 19-20; PX 177]; *before* the Committee "agreed" on February 9 to raise the threshold to $450,000 [PX 8A; App. 19];[8] *before* the Mobil-Superior merger agreement was signed on March 11 [Tr. 959]; and *before* any projections of possible "window period" retirees were generated [PX 229 (February 28), PX 230 (April 13), PX 114 (April 17)].

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the court asked only about Mobil's reason for "changing the threshold," counsel had no occasion to mention what petitioner [at 17] calls the "fairness" rationale (giving employees a chance to retire under the terms of the "old" Plan). "Fairness" explains why Mobil offered a "window" period [App. 17-18], not why it "chang[ed] the threshold."

[8] Petitioner argues [at 24] that Mobil's Executive Committee did not "adopt" the Plan amendments on February 9. The minutes of the meeting state that the Committee "agreed to" the amendments on that date. [PX 8A.] On June 13, 1984, the Committee "adopted the following amendments . . . as previously approved on February 9, 1984." [PX 10A at 2.] The difference—if any—between "agreed to" and "adopted" is immaterial, because (a) the "window" period had already been established by January 9 [App. 18-19] and (b) the decision to amend the Plan was made on February 9 [App. 19].

This uncontroverted chronology of events undergirds the Tenth Circuit's correct conclusion that "the record does not otherwise indicate any link between Mobil's merger with Superior and the Executive Committee's decision at its January 9 meeting to incorporate a notice period into any future changes in the Plan." [App. 20.][9]

"Ignored" Evidence. The other evidence petitioner says the Tenth Circuit "ignored" [at 24-25] is illusory.

• There is no evidence that "a program of 'organizational streamlining' had 'been underway since 1981.' " This patchwork quotation [at 24] refers to a March *1986* interview with Mobil's chairman, who said "our drive toward efficiency has been under way since 1981. We're selling the assets that don't meet our test of leadership." [PX 59 at 3.] Later, in responding to a question about "[c]areer development," he observed that "organizational streamlining has reduced the total number of jobs available to promote people into." [*Id.*]

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[9] The Tenth Circuit could have reversed for at least two other reasons—each of which would be an alternative ground for affirming the court of appeals' judgment.

First, there was no age discrimination or constructive discharge as a matter of law. *All* Mobil employees, regardless of age, lost the "right" to a lump-sum pension under the $250,000 threshold; older employees therefore were no "worse off" than younger ones, even if *all* were for some reason thought to be "worse off" than they had been before the amendments. *E.g.*, *Schuler* v. *Polaroid Corp.*, 848 F.2d 276 (1st Cir. 1988); *Bodnar* v. *Synpol, Inc.*, 843 F.2d 190 (5th Cir.), *cert. denied*, 488 U.S. 908 (1988); *Henn* v. *National Geographic Soc'y*, 819 F.2d 824 (7th Cir.), *cert. denied*, 484 U.S. 964 (1987); *Christopher* v. *Mobil Oil Corp.*, No. B-89-0653-CA (E.D. Tex. June 22, 1990), *appeal docketed*, No. 90-4562 (5th Cir. July 18, 1990) [at A-1] (summary judgment for Mobil on ADEA claims brought by former employees who—after petitioner prevailed against Mobil in the district court—claimed that they too had been "forced" to retire because of Mobil's 1984 Plan amendments).

Second, ADEA § 4(f)(2), 29 U.S.C. § 623(f)(2), permits the use of age-based criteria for determining fringe benefits such as pensions. *See Public Employees Retirement Sys.* v. *Betts*, 109 S. Ct. 2854 (1989), which the Tenth Circuit declined to apply in this case [App. 13-15].

• The transcript says only that "by '81, weren't—wasn't the oil industry in general, and Mobil in particular, beginning to tighten up financially in anticipation of tougher times?" "Yes, that's correct." [Tr. 160.]

• Petitioner's reference [at 25] to "a long standing 'company policy' designed 'to encourage employees to leave' " relates to a common provision in Mobil's Plan allowing employees to retire at age 60 with unreduced retirement benefits even though normal retirement age under the Plan is 65. [PX 133.] This policy has nothing to do with the Plan amendments at issue here.

Less Onerous Alternatives. Contrary to his assertion [at 10], petitioner did not demonstrate the existence of equally effective alternatives with less adverse impact on older employees. "Grandfathering" the $250,000 threshold—or eliminating it entirely—as an alternative to the "window" period would not have prevented a potential drain on the Plan because it would not have reduced the rate of lump-sum withdrawals. It would also have defeated the other important purposes of the 1984 amendments: to restore the 1977 eligibility requirements (in constant dollars) [App. 17] and to make lump-sum distributions available only to retirees with sufficient financial assets to withstand the risks involved [Tr. 319-21, 906-07]. Petitioner therefore did not meet his burden of showing alternatives that were equally effective as Mobil's chosen business practices in achieving Mobil's legitimate goals. *Wards Cove,* 109 S. Ct. at 2126-27.

Mobil's business reasons were valid, and petitioner's evidence failed to raise a jury issue. This is not a matter for certiorari.

E. The Tenth Circuit Is Not "Hostile" to ADEA Claims and Needs No "Supervision."

Petitioner's intemperate attacks on the court of appeals for its alleged "hostility to the purposes of the ADEA" [at 8] are

baseless.[10] The Tenth Circuit has repeatedly sustained ADEA claims after trial.[11]

The Tenth Circuit's reversal in this case is hardly unique; other courts of appeals have frequently reversed rulings for ADEA plaintiffs because of insufficient evidence of age discrimination.[12]

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[10] According to petitioner, the Tenth Circuit also "grossly overstepped the bounds of its reviewing authority" [at 9] and "plainly misapprehends, or refuses to follow, this Court's direction" [at 17]; "petitioner and his counsel were amazed by the opinion of the court of appeals" [at 17]; the court's "gross disregard of the record resulted from a hostility to ADEA" [at 18]; "[t]he Tenth Circuit rummaged through the factual record in this case in startling and extraordinary disregard of [the law]" [at 20]; and it committed other "glaring errors" [at 26].

[11] *E.g.*, *Spulak* v. *K Mart Corp.*, 894 F.2d 1150 (10th Cir. 1990) (affirming verdict); *Anderson* v. *Phillips Petroleum Co.*, 861 F.2d 631 (10th Cir. 1988) (affirming liability); *Cooper* v. *Asplundh Tree Expert Co.*, 836 F.2d 1544 (10th Cir. 1988) (affirming liability); *Bruno* v. *Western Elec. Co.*, 829 F.2d 957 (10th Cir. 1987) (affirming verdict); *Furr* v. *AT&T Technologies*, 824 F.2d 1537 (10th Cir. 1987) (affirming verdict); *Smith* v. *Consolidated Mut. Water Co.*, 787 F.2d 1441 (10th Cir. 1986) (affirming liability); *Cockrell* v. *Boise Cascade Corp.*, 781 F.2d 173 (10th Cir. 1986) (reversing directed verdict for defendant); *EEOC* v. *University of Okla.*, 774 F.2d 999 (10th Cir. 1985), *cert. denied*, 475 U.S. 1120 (1986) (reversing judgment n.o.v. for defendant); *EEOC* v. *Prudential Fed. Sav. & Loan Ass'n*, 763 F.2d 1166 (10th Cir.), *cert. denied*, 474 U.S. 946 (1985) (affirming verdict).

[12] *See* n.6, above; *accord Smith* v. *Goodyear Tire & Rubber Co.*, 895 F.2d 467 (8th Cir. 1990); *Brownlow* v. *Edgecomb Metals Co.*, 867 F.2d 960 (6th Cir. 1989); *Bristow* v. *Daily Press*, 770 F.2d 1251 (4th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986).

II

The ERISA "Participant" Holding Follows a Uniform Line of Decisions of this Court and the Courts of Appeals.

The Tenth Circuit correctly held that petitioner did not have a cause of action as a "participant" under ERISA § 502(a), 29 U.S.C. § 1132(a). [App. 21-24.][13]

ERISA defines a "participant" as "any employee or former employee . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan." ERISA § 3(7), 29 U.S.C. § 1002(7). This Court recently held that "[a] former employee who has neither a reasonable expectation of returning to covered employment nor a colorable claim to vested benefits . . . simply does not fit within [§ 3(7)'s] phrase 'may become eligible [to receive a benefit].'" *Firestone Tire & Rubber Co.* v. *Bruch*, 109 S. Ct. at 958 (adopting the Ninth Circuit's definition in *Kuntz* v. *Reese*, 785 F.2d 1410, 1411 (9th Cir.) (per curiam), *cert. denied*, 479 U.S. 916 (1986)).

The Tenth Circuit correctly applied *Firestone*: petitioner (a) never sought to return to covered employment; (b) did not have "a colorable claim to vested *benefits*" (because he had received all of his benefits in a lump sum when he retired at the end of 1984); and (c) wanted only damages—back pay, front pay and fringe benefits for years he never worked—not "benefits" under the Plan.[14]

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[13] Petitioner suggests [at 28] that he should have ERISA standing because the district court held his common-law claims preempted by ERISA. He never cross-appealed those claims and cannot raise them here. In any event, he is wrong. *E.g.*, *Lee* v. *E.I. duPont de Nemours & Co.*, 894 F.2d 755, 756-57 (5th Cir. 1990); *Phillips* v. *Amoco Oil Co.*, 799 F.2d 1464, 1470 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987); *cf. Guss* v. *Utah Labor Relations Bd.*, 353 U.S. 1, 10-11 & n.16 (1957) (NLRA case).

[14] *Accord Kuntz*, 785 F.2d at 1411 ("if successful, [lump-sum retiree's] claim would result in a damage award, not an increase of vested benefits," and "a damage claim is not a plan benefit"); *Freeman* v. *Jacques Orthopaedic & Joint Implant Surgery Medical Group*, 721 F.2d 654, 655-56 (9th Cir. 1983); *see also Sommers Drug Stores Co. Employee*

Nor is there a "split among the circuits." The other courts of appeals that have considered this issue have all agreed with the Tenth Circuit: a former employee who has received a lump-sum payment of every cent of his pension benefits is not a "participant" and may not sue under ERISA. *Berger* v. *Edgewater Steel*, Nos. 89-3465, -3501, -3570, -3596 (3d Cir. Aug. 15, 1990) (available on Lexis); *Clark* v. *Superior Court*, 905 F.2d 389, 389 (D.C. Cir. 1990) (per curiam); *Kuntz* v. *Reese*, 785 F.2d at 1411; *Yancy* v. *American Petrofina*, 768 F.2d 707, 708-09 (5th Cir. 1985) (per curiam); *Joseph* v. *New Orleans Elec. Pension & Retirement Plan*, 754 F.2d 628, 630 (5th Cir.), *cert. denied*, 474 U.S. 1006 (1985); *Gilquist* v. *Becklin*, 675 F. Supp. 1168, 1171 (D. Minn. 1987), *aff'd mem.*, 871 F.2d 1093 (8th Cir. 1988); *see also Teagardener* v. *Republic-Franklin Pension Plan*, No. 89-3865 (6th Cir. Aug. 6, 1990) (available on Lexis).[15]

Petitioner's assertion [at 27, 28] that he asked for reinstatement is specious:

• Petitioner's "internal appeals" requested only termination pay and additional benefits calculated as if he had worked to age 60. [PX 60A, DX EQ, PX 60, DX GB, DX GF, DX GH, DX GL, PX 88, PX 89, DX GX, DX HD; App. 24.]

• Petitioner's complaint and amended complaint requested only "retirement benefits" and "lost wages" on his ERISA

Profit Sharing Trust v. *Corrigan*, 883 F.2d 345, 350 (5th Cir. 1989) (ERISA "benefit" is "an ascertainable amount" that allegedly "was owed [to plaintiffs] and should have been paid to them at the time they received their lump sum settlement").

[15] A Department of Labor regulation makes the point clear: "[a]n individual is not a participant covered under an employee pension plan . . . if . . . [t]he individual has received from the plan a lump-sum distribution or a series of distributions of cash or other property which represents the balance of his or her credit under the plan." 29 C.F.R. § 2510.3-3(d)(2)(ii)(B). Because it is one of the agencies charged with enforcing ERISA, the Department's views are entitled to special deference. *Chevron, U.S.A.* v. *Natural Resources Defense Council*, 467 U.S. 837, 844-45 (1984).

Although the Tenth Circuit expressly followed the Fifth Circuit's decisions in *Yancy* and *Joseph* [App. 23], petitioner's recitation of an alleged "conflict among the circuits" does not mention either case.

claims. The parties' agreement to an award of front pay instead of reinstatement therefore applied only to the *ADEA* claim (which is the only place the complaints mentioned reinstatement).

• Petitioner's reference to the pretrial order (which is not in the record on appeal) is makeweight. The amended complaint, filed ten months *after* the pretrial order and only two months before trial, makes it clear that petitioner purportedly wanted reinstatement only on his ADEA claim and not under ERISA.

Even if petitioner had wanted to return to work and had asked for "reinstatement," he still would not have been able to sue as an ERISA "participant." The term covers a person who "may become eligible to receive a benefit," ERISA § 3(7), and therefore may include a former employee with " 'a reasonable expectation of returning to covered employment.' " *Firestone*, 109 S. Ct. at 958.

But this part of the definition applies only to someone who (a) has not yet fulfilled his or her *eligibility requirements* for benefits and (b) "has a colorable claim that ... *eligibility requirements* will be fulfilled in the future" if he or she is reinstated. *Firestone*, 109 S. Ct. at 958 (emphasis added); *see also id.* at 958-59 (Scalia, J., concurring) ("the phrase 'may become eligible' has nothing to do with the probabilities of winning a suit").

Petitioner fulfilled the Plan's eligibility requirements years ago. When he retired, he received every penny of his fully vested pension. He cannot now claim to be a "participant" merely by asking for judicial reinstatement to earn increases in the benefits for which he was already eligible.[16]

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[16] *Christopher* v. *Mobil Oil Corp.* [at A-3] also held that former Mobil employees who—like petitioner—claimed they had been "forced" to retire because of Mobil's 1984 Plan amendments were not ERISA "participants," notwithstanding their belated claim that they wanted to be reinstated.

There is no circuit split on this issue.

• *None* of the "conflicting" cases petitioner cites even discusses ERISA's definition of "participant."

• Most of them involved plaintiffs who—unlike petitioner—were prevented from fulfilling *eligibility requirements* to attain vested benefits. *McLendon* v. *Continental Can Co.*, No. 89-5596 (3d Cir. July 26, 1990) (available on Lexis) (scheme to terminate plaintiffs before they attained eligibility for layoff benefits); *Zipf* v. *American Tel. & Tel. Co.*, 799 F.2d 889, 890 (3d Cir. 1986) (termination prevented plaintiff from attaining right to medical benefits after eight days' absence); *Kross* v. *Western Elec. Co.*, 701 F.2d 1238, 1239 (7th Cir. 1983) (termination prevented plaintiff from attaining right to vested "service pension" after two more years of work); *Bradley* v. *Capital Eng'g & Mfg.*, 678 F. Supp. 1330, 1332 (N.D. Ill. 1988) (termination prevented plaintiff from becoming eligible for medical coverage for pre-existing conditions); *Boesl* v. *Suburban Trust & Sav. Bank*, 642 F. Supp. 1503, 1506 (N.D. Ill. 1986) (defendants' conduct may have prevented decedent from becoming eligible for medical benefits, although plaintiff claimed benefits were due under plan).[17]

• The plaintiff in the only other case petitioner cites, *Warren* v. *Society Nat'l Bank*, 905 F.2d 975, 982 (6th Cir. 1990), was not seeking "compensatory damages" but "a *benefit* to which he was entitled under the plans" (emphasis added).[18]

• Petitioner's argument [at 28-29] focuses on cases involving violations of ERISA § 510, 29 U.S.C. § 1140. But the district court did not find a § 510 violation. [App. 38.]

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[17] Similarly, in *Berger* v. *Edgewater Steel*, the plaintiffs allegedly were prevented from fulfilling eligibility requirements for early-retirement benefits.

[18] *Teagardener* v. *Republic-Franklin Pension Plan*, cited above, is the Sixth Circuit's most recent opinion in this area and—unlike *Warren*—expressly addresses ERISA's definition of "participant."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 17, 1990

APPENDICES

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

GERALD W. CHRISTOPHER, *et al.*, *Plaintiffs,*	§	
v.	§	Civ. No. B-89-0653-CA
MOBIL OIL CORPORATION, *et al.*, *Defendants.*	§	

ORDER

1. CAME ON to be considered the Motion for Summary Judgment filed by defendants Mobil Oil Corporation, the Retirement Plan of Mobil Oil Corporation and Rex Adams (collectively, "Mobil"); and the Court, having considered such Motion, the supporting memorandum, statement of undisputed facts, declaration and affidavit, and plaintiffs' opposition thereto, finds:

A. Plaintiffs' Age Discrimination in Employment Act ("ADEA") claims are time-barred because (*i*) plaintiffs did not file an age-discrimination charge with the Equal Employment Opportunity Commission within 300 days after the alleged discrimination occurred (29 U.S.C. § 626(d)(2)), and (*ii*) plaintiffs did not file a lawsuit under ADEA within three years after the alleged discrimination occurred (29 U.S.C. §§ 255(a), 626(e));

B. Plaintiffs' state-law claims are time-barred by applicable statutes of limitations;

C. Plaintiffs were not constructively discharged in violation of ADEA; and

D. Plaintiffs' claims of discrimination arise from changes in the fringe benefits available under Mobil's bona fide Retirement Plan, not from any conduct related to the nonfringe-benefit aspects of plaintiffs' employment, and are therefore not within the scope of ADEA pursuant to 29 U.S.C. § 623(f)(2).

2. Based on these findings, the Court is of the opinion that said motion should be in all things GRANTED.

3. It is therefore ORDERED, ADJUDGED and DECREED by the Court that defendants' Motion for Summary Judgment be, and the same hereby is, GRANTED and the case dismissed in its entirety with prejudice, at plaintiffs' cost.

SIGNED THIS 22nd day of June, 19[90].

/s/ RICHARD A. SCHELL
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

GERALD W. CHRISTOPHER, *et al.*, *Plaintiffs,*	§	
v.	§	Civ. No. B-89-0653-CA
MOBIL OIL CORPORATION, *et al.*, *Defendants.*	§	

ORDER

1. CAME ON to be considered the Motion for Judgment on the Pleadings and Motion to Dismiss filed by defendants Mobil Oil Corporation, the Retirement Plan of Mobil Oil Corporation and Rex Adams (collectively, "Mobil"); and the Court, having considered such Motion, the supporting memorandum, and plaintiffs' opposition thereto, finds:

A. Plaintiffs' state-law claims are preempted by the Employee Retirement Income Security Act of 1974 ("ERISA") because those claims relate to Mobil's Retirement Plan, which is governed by ERISA, and directly overlap with provisions of ERISA;

B. Plaintiffs are not participants seeking to recover benefits under Mobil's Retirement Plan and therefore have no cause of action under ERISA § 502; and

C. The Court lacks jurisdiction over plaintiffs' ERISA claim because plaintiffs do not have a cause of action under ERISA.

2. Based on these findings, the Court is of the opinion that said motion should be in all things GRANTED.

3. It is therefore ORDERED, ADJUDGED and DECREED by the Court that defendants' Motion for Judgment on the Pleadings and Motion to Dismiss be, and the same hereby is, GRANTED and the case dismissed in its entirety with prejudice, at plaintiffs' cost.

SIGNED THIS 22nd day of June, 19[90].

/s/ RICHARD A. SCHELL
United States District Judge

**Listing Pursuant to Sup. Ct. R. 29.1
of Parent and Non-Wholly-Owned
Subsidiaries of Mobil Oil Corporation**

MOBIL CORPORATION (parent)

ABRORAY PTY. LIMITED
ABU DHABI PETROLEUM COMPANY LIMITED
ACE POLYMER CO., LTD.
ADRIA WIEN PIPELINE GESMBH
AIMCO (ALPHA) SHIPPING COMPANY
AIMCO (OMEGA) SHIPPING COMPANY LTD.
AIRCRAFT FUEL SUPPLY B.V.
AIRTANKDIENST KOELN
AK CHEMIE GMBH & CO. KG
AKAUMA ASPHALT INDUSTRIES, LTD.
ALEXANDROUPOLIS PETROLEUM INSTALLATION S.A.
ALPHA-ALET VE DAYANIKLI TUKETIM MAMULLERI PAZARLAMA A.S.
ALTONA PETROCHEMICAL COMPANY LIMITED
AMMENN GMBH
ANDREWS OIL PTY. LIMITED
ANKARA GAZ SATIS A.S.
ARABIAN AMERICAN OIL COMPANY
ARABIAN CHEMICAL TERMINALS
ARABIAN ENERGY COMPANY LIMITED
ARABIAN INTERNATIONAL MARITIME COMPANY
ARABIAN INTERNATIONAL MARITIME COMPANY LIMITED
ARABIAN PETROLEUM SUPPLY CO. S.A.
ARABIAN SHIPPING & TRADING CO. S.A.
ARABIAN TRADING CO. S.A.
ARAL A.G.
ATAS ANADOLU TASFIYEHANESI A.S.
ATLAS SAHARA S.A.
AUSTRALIAN SYNTHETIC RUBBER CO. LIMITED
AUTOBAHN-BETRIEBE GMBH
AVIATION FUEL SERVICES LIMITED
AYGAZ A.S.

BALGEE OIL PTY. LIMITED
BANGKOK AVIATION FUEL SERVICES LIMITED
BAYERISCHE ERDGASLEITUNG GMBH
BAYERISCHE MINERAL-INDUSTRIE A.G.
BEER GMBH
BEER GMBH & CO. MINERALOEL-VERTRIEBS-KG
BIN SULAIMAN MOBIL TOWERS
BUFFALO RIVER IMPROVEMENT CORPORATION
BUTEY SARL
CANADIAN SUPERIOR OIL (AUST.) PTY. LTD.
CANNER'S STEAM COMPANY INC.
CANYON REEF CARRIERS INC.
CARBURANTI, LUBRIFICANTI E AFFINI MERIDIONALI-CLEAM S.P.A.
CARBURANTS JEAN COTE COLISSON
CARPI GAS S.R.L.
CAS (COMBINED AUTOMATION SYSTEM) B.V.
CEED DESIO S.R.L.
CELMISIA SHIPPING CORPORATION
CENTRAL AFRICAN PETROLEUM REFINERIES (PRIVATE) LIMITED
CERCERA S.A.
CHANGI AIRPORT FUEL HYDRANT INSTALLATION PTE. LTD.
COBAR PTY. LIMITED
COLLINS PIPELINE COMPANY
COLOMBIANOS DISTRIBUIDORES DE COMBUSTIBLES, S.A. "CODI"
COLONIAL PIPELINE COMPANY
COMBUSTIBLES COLMERAUER
COMET BRENNSTOFFDIENST GMBH
COMMERCIAL POLYMERS PTY. LIMITED
COMMODORE MARITIME COMPANY S.A.
COMPAGNIE AFRICAINE DE TRANSPORT CAMEROUN (CAT.CN)
COMPAGNIE D'ENTREPOSAGE COMMUNAUTAIRE
COMPAGNIE DES PETROLES PRIMAGAZ
COMPAGNIE IMMOBILIERE (COMIMMO)
COMPAGNIE REGIONALE DE DISTRIBUTION DE PRODUITS PETROLIERS (CO.RE.DIS)

COMPAGNIE SENEGALAISE DES LUBRIFIANTS
COMPANIA DE LUBRICANTES DE CHILE LIMITADA (COPEC MOBIL LTDA.)
COMPANIA MEXICANA DE ESPECIALIDADES INDUSTRIALES, S.A. DE C.V.
CONSORTIUM RAYMOND DUEZ
COOK INLET PIPE LINE COMPANY
CORCOP
CRC LYON CHAUFFAGE
CRCP
CYPRUS PETROLEUM REFINERY LIMITED
DEBA S.R.L. INDUSTRIA PETROLIFERA
DEPOSITI GENOVESI S.P.A.
DEPOT PETROLIER DE MOUREPIANE
DEPOT PETROLIER DU GRESIVAUDAN
DEPOTS DE PETROLE COTIERS
DEPOTS PETROLIERS DE LA CORSE (DPLC)
DEUTSCHE PENTOSIN-WERKE GMBH
DEUTSCHE TRANSALPINE OELLEITUNG GMBH
DICOMI S.R.L.
DIXIE PIPELINE COMPANY
DUKHAN SERVICES COMPANY W.L.L.
DUPONT & DEWULF N.V.
EAST TEXAS SALT WATER DISPOSAL COMPANY
ENERGAS S.P.A.
ENERGIE ALPES
ENERGIE NORD DISTRIBUTION
ENTREPOT PETROLIER DE MULHOUSE
ENTREPOT PETROLIER DE NANCY
ENTREPRISE ALEXANDRE VIDAL
ENTREPRISE JEAN LEFEBVRE
ERDGAS-VERKAUFS-GMBH
ERDOEL-RAFFINERIE NEUSTADT GMBH & CO. OHG
ERDOL-LAGERGESELLSCHAFT MBH
ETABLISSEMENTS BOUTHENET
ETABLISSEMENTS JOSEPH WALLACH
ETABLISSEMENTS ROHRMANN DUFOSSE
ETABLISSEMENTS STARCK & CIE
ETS. LATHUILLERE
EUROPETROL S.P.A.

FAIRWIND MARITIME COMPANY S.A.
FAVANG AUTOVERKSTED A/S
FELIX OIL COMPANY
FIAMMA LAZIALE S.P.A.
FIBIL S.A.
FILTROS DE COSTA RICA, S.A.
FIOUL ASSISTANCE SERVICE
FRUEHMESSER GMBH
FRUEHMESSER MINERALOLHANDELS GMBH & CO. KG
FUSO OPERATIONS KABUSHIKI KAISHA
GATWICK REFUELLING SERVICES LIMITED
GAZAL-GAZ ALETLERI A.S.
GEOMINES-CAEN
GEOVEXIN
GHANA BUNKERING SERVICES LIMITED
GUZZARDI PETROLEUM (GIPPSLAND) PTY. LIMITED
HANIEL HANDEL GMBH
HEIZOL-HANDELSGESELLSCHAFT MBH
HELLAS GAS STORAGE CO. S.A.
HIBERNIA MANAGEMENT AND DEVELOPMENT COMPANY LIMITED
HYDRANTEN-BETRIEBS-GESELLSCHAFT FLUGHAFEN/FRANKFURT _
INDUSTRIA INTERAMERICANA DE FILTROS LTDA. "INTERFIL"
INTO PLANE SERVICES-I.P.S.-S.R.L.
INTOPLANE SERVICES COMPANY LIMITED
IRANIAN OIL PARTICIPANTS LTD.
IRANIAN OIL SERVICES (HOLDINGS) LTD.
IRANIAN OIL SERVICES LIMITED
IRAQ PETROLEUM COMPANY LIMITED
IRAQ PETROLEUM PENSIONS LIMITED
ISIDE S.P.A.
ISTANBUL PETROL VE MAKINA YAGLARI LTD. STI.
ITALOIL S.R.L.
JAPAN AIRPORT FUELING SERVICE COMPANY, LTD.
JECOP
JET AVIATION SAUDI ARABIA COMPANY LIMITED

K.K. NIPPATSU
K.K. SANKYO PLASTICS
K.K. TORESEN
KANSAI PETRO-TERMINAL CO., LTD.
KANTO KYGNUS SEKIYU HAMBAI K.K.
KARL STORZ GMBH & CO. KG
KAWASAKI KYGNUS SEKIYU HAMBAI K.K.
KEIYO SEA-BERTH COMPANY, LTD.
KELINDA PTY. LIMITED
KLAUS KOEHN GMBH
KLAUS KOEHN GMBH & CO. MINERALOEL KG
KUEBLER HEIZOL A.G.
KUMOSAR S.R.L.
KURT AMMENN GMBH & CO. KG
KYGNUS EKKA GAS KABUSHIKI KAISHA
KYGNUS KOSAN KABUSHIKI KAISHA
KYGNUS MARKETING SERVICE K.K.
KYGNUS SEKIYU KABUSHIKI KAISHA
KYGNUS SEKIYU SEISEI KABUSHIKI KAISHA
KYOKUTO SEKIYU KOGYO KABUSHIKI KAISHA
LA CENTRAFRICAINE DES PETROLES
LES NOUVEAUX COMPTOIRS PETROLIERS
LIPET-LIKIT PETROL GAZI VE YAKIT TICARET A.S.
LUBLEND LIMITED
LUBRICANTES DEL SUR, S.A.
MARCEAUX & CIE
MARS-MILAN AIRPORT REFUELLING SERVICE S.R.L.
MATCO TANKERS (U.K.) LIMITED
MEENTZEN & FRANKE GMBH & CO.
MERITRANS S.P.A.
MERTL GMBH
MID STATE PETROLEUM PTY. LIMITED
MINERALOEL-HANDELS-GMBH
MINERALOELWERK WEDEL GMBH & CO. OHG
MOBIL CATALYSTS CORPORATION OF JAPAN
MOBIL KOREA LUBE OIL, INC.
MOBIL MARKETING BARBADOS COMPANY LIMITED
MOBIL MOTOR REST S.A.

MOBIL OIL DE MEXICO, S.A. DE C.V.
MOBIL OIL DJIBOUTI
MOBIL OIL FRANCAISE
MOBIL OIL GABON
MOBIL OIL GHANA LIMITED
MOBIL OIL MAROC
MOBIL OIL NIGERIA LIMITED
MOBIL OIL PORTUGUESA S.A.
MOBIL OIL SIERRA LEONE LIMITED
MOBIL POLYMERS INTERNATIONAL SARL
MOBIL PRODUCING CAMEROON INC.
MOBILGAZ MOBIL PETROL GAZLARI A.S.
MOGESTE-GESTAO DE POSTOS DE ABASTECIMENTO LDA.
MOTEL REST S.A.
MT. MARROW BLUE METAL QUARRIES PTY. LIMITED
N.V. ROTTERDAM-RIJN PIJPLEIDING MAATSCHAPPIJ
N.V. SOCONY-STANDARD-VACUUM OIL COMPANY (PETROLEUM MAATSCHAPPIJ)
NAKAJIMA KOSAN KABUSHIKI KAISHA
NEAR EAST DEVELOPMENT CORPORATION
NEW ZEALAND REFINING COMPANY LIMITED
NEW ZEALAND SYNTHETIC FUELS (HOUSING) CORPORATION LIMITED
NEW ZEALAND SYNTHETIC FUELS CORPORATION LIMITED
NICHIMO OIL (BERMUDA) CO., LTD.
NIPPON UNICAR COMPANY, LIMITED
NORDDEUTSCHE ERDGAS-AUFBEREITUNGS-GMBH
NORVAC PTY. LIMITED
NOVODIS
OLDENBURGISCHE ERDOEL GMBH
P.T. ARUN NATURAL GAS LIQUEFACTION COMPANY
P.T. BERAU COAL
P.T. STANVAC INDONESIA
PALOMA PIPE LINE COMPANY
PARS INVESTMENT CORPORATION (PRIVATE COMPANY)

PAUL HARLING MINERALOEL GMBH & CO. KG
PEACE PIPE LINE LTD.
PERKAL PTY. LIMITED
PERRETTI PETROLI S.P.A.
PETROCAB
PETROCAM PTY. LIMITED
PETROGAS PROCESSING LTD.
PETROL FUEL S.P.A.
PETROL TEAM S.P.A.
PETROLEUM REFINERIES (AUSTRALIA) PTY. LIMITED
PETROLEUM SERVICES (MIDDLE EAST) LIMITED
PETROMIN LUBRICATING OIL COMPANY
PETROMIN LUBRICATING OIL REFINING COMPANY
PETROMIN-MOBIL YANBU REFINERY COMPANY LTD.
PLEGADIZOS PARA LA INDUSTRIA S.A.
PRESNALL PTY. LIMITED
PROGAS LIMITED
PROVIDANGE
P6-GROEP B.V.
RAINBOW PIPE LINE COMPANY LTD.
RED SEA PLASTIC FACTORY COMPANY LIMITED
REGULUS HOLDING (SINGAPORE) PTE. LTD.
RHODES PETROLEUM INSTALLATION S.A.
ROHOL-AUFSUCHUNGS GMBH
RUHRG[illegible]A.G.
RUNDEL MINERALOELVERTRIEB GMBH
S.C. BRUSSELS AIRFUELS SERVICES C.V.
SABA-SOCIEDADE ABASTECEDORA DE AERONAVES LDA.
SARL ETABLISSEMENTS MICHEL FAURE
SAUDI CAN COMPANY LTD.
SAUDI CHEMICAL INDUSTRIES COMPANY LTD.
SAUDI MARITIME COMPANY LTD.
SAUDI TANKERS LIMITED
SAUDI YANBU PETROCHEMICAL CO.
SCHUBERT KOMMANDITGESELLSCHAFT
SEGHER DE MEXICO, S.A. DE C.V.
SEIBU KYGNUS SEKIYU HAMBAI K.K.
SENERCO
SERAM S.P.A.
SERENI ET COMPAGNIE

SIERRA LEONE PETROLEUM REFINING COMPANY LIMITED
SOCIETA ITALIANA PER L'OLEODOTTO TRANSALPINO-SIOT S.P.A.
SOCIETE "LES FILS DE FERRERO"
SOCIETE AFRICAINE DE RAFFINAGE (S.A.R.)
SOCIETE ANONYME DE GESTION DES STOCKS DE SECURITE
SOCIETE BELGE DE TRANSPORT PAR PIPELINE S.A.
SOCIETE BRETONNE DE DISTRIBUTION DE PRODUITS PETROLIERS
SOCIETE CAMEROUNAISE DE DEPOTS PETROLIERS (S.C.D.P.)
SOCIETE CAMEROUNAISE-EQUATORIALE DE FABRICATION DE LUBRIFIANTS (S.C.E.F.L.)
SOCIETE D'ENTREPOSAGE DE GABES
SOCIETE D'ENTREPOSAGE DE SAN PEDRO
SOCIETE D'ENTREPOSAGE PETROLIER AU BURUNDI (SEP BURUNDI)
SOCIETE DE CONSTRUCTION & DE GESTION CB.12
SOCIETE DE GESTION DES STOCKS PETROLIERS DE COTE D'IVOIRE (GESTOCI)
SOCIETE DE MANUTENTION CARBURANTS AVIATION DE TAHITI (SOMCAT)
SOCIETE DE MANUTENTION DE CARBURANTS AVIATION (S.M.C.A.)
SOCIETE DE MANUTENTION DE CARBURANTS AVIATION DAKAR-OFF
SOCIETE DES BITUMES & CUT-BACKS DU CAMEROUN (S.B.C.B.C.)
SOCIETE DJIBOUTIENNE D'ENTREPOSAGE DE PRODUITS PETROLIERS
SOCIETE GABONAISE D'ENTREPOSAGE DE PRODUITS PETROLIERS
SOCIETE GABONAISE DE RAFFINAGE
SOCIETE IVOIRIENNE DE FABRICATION DE LUBRIFIANTS (S.I.F.A.L.)
SOCIETE IVOIRIENNE DE RAFFINAGE
SOCIETE MALIENNE D'ENTREPOSAGE (S.M.E.)
SOCIETE MAURITANIENNE D'ENTREPOSAGE DE PRODUITS PETROLIERS
SOCIETE MEDITERRANEENNE DE PRODUITS PETROLIERS
SOCIETE NATIONALE DE RAFFINAGE

SOCIETE NORMANDE DE COMBUSTIBLES ET LUBRIFIANTS-NICOL
SOCIETE PIZO DE FORMULATION DE LUBRIFIANTS
SOCIETE REGIONALE DE PRODUITS ENERGETIQUES
SOCIETE REGIONALE DE PRODUITS PETROLIERS
SOCIETE STATION-SERVICE LUNES
SOCIETE TAHITIENNE DE DEPOTS PETROLIERS
SOCIETE TAHITIENNE DES OLEODUCS (STDO)
SOCIETE TCHADIENNE D'ENTREPOSAGE DE PRODUITS PETROLIERS
SOCIETE TOGOLAISE D'ENTREPOSAGE
SOCIETE ZAIROISE D'EMBALLAGE
SOLAR S.R.L.
SOMODIP
SOUTH SASKATCHEWAN PIPE LINE COMPANY
STATFJORD TRANSPORT A.S.
STRASBURGER ENTERPRISES (PROPERTIES) PTY. LIMITED
SUN EAST COMPANY LIMITED
SYDNEY METROPOLITAN PIPELINE PTY. LIMITED
T&M TERMINAL COMPANY
TANKBAU-GMBH
TANKLAGERGESELLSCHAFT KOELN-BONN
TAR TANKANLAGE RUEMLANG A.G.
TECKLENBURG GMBH
TECKLENBURG GMBH & CO. ENERGIEBEDARF KG
TGF TANKDIENST-GESELLSCHAFT FRANKFURT
THAILAND SOLVENT PRODUCTS LIMITED
THUMS LONG BEACH COMPANY
TOHKO PLASTICS COMPANY LIMITED
TOHPREN CO. LTD.
TOKUSHIMA SEKIYU KABUSHIKI KAISHA
TONEN CORPORATION
TONEN ENERGY AND MARINE (SINGAPORE) PTE. LTD.
TONEN ENERGY INTERNATIONAL CORPORATION
TONEN PROPERTIES INC.
TONEN SEKIYUKAGAKU KABUSHIKI KAISHA
TONEN SOGO SERVICE CO. LTD.
TONEN SYSTEM PLAZA INC.
TONEN SYSTEM SERVICE INC.
TONEN TANKER KABUSHIKI KAISHA

TONEN TAPYRUS COMPANY LIMITED
TONEN TECHNOLOGY KABUSHIKI KAISHA
TONEX COMPANY LIMITED
TOWA COMPOUNDING COMPANY LIMITED
TOYOSHINA FILM COMPANY LIMITED
TRADEWIND MARITIME CO. S.A.
TRANS-ARABIAN PIPE LINE COMPANY
TRANSALPINE OELLEITUNG IN OESTERREICH GMBH
TRESKOME PTY. LIMITED
TRYICE PTY. LIMITED
TURKISH PETROLEUM COMPANY LIMITED
TWIFO OIL PALM PLANTATION LIMITED
UBAG UNTERFLUR-BETANKUNGSANLAGE A.G.
UNITED KINGDOM OIL PIPELINES LIMITED
VALODIA
W.A.G. PIPELINE PTY. LIMITED
WAITOMO/BRENAN PETROLEUM LIMITED W/BP
WAKO JUSHI KABUSHIKI KAISHA
WAKO KASEI KABUSHIKI KAISHA
WALTON-GATWICK PIPELINE COMPANY LIMITED
WERNER WEIDEMANN MINERALOELVERTRIEB GMBH
WEST LONDON PIPELINE AND STORAGE LIMITED
WEST SHORE PIPE LINE COMPANY
WILHELM MERTL GMBH & CO. KG
WIRI OIL SERVICES LIMITED
WOLVERINE PIPE LINE COMPANY
WYMONDHAM OIL STORAGE CO. LIMITED
YPERSE OLIEFABRIEK JOS DEWULF HENRI N.V.
ZAIRE MOBIL OIL
ZAIRE S.E.P.